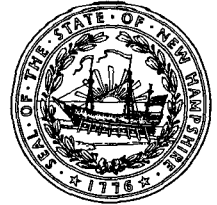




State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-2147 FAX (603) 271-6588



David Emerson and Gail Ruocco
85 North Rd.
Kingston, NH 03848

Re: Wetlands Bureau File 2004-387

ADMINISTRATIVE ORDER
No. WD 05-27

August 17, 2005

A. INTRODUCTION

This Administrative Order is issued by the Department of Environmental Services, Water Division to David Emerson pursuant to RSA 482-A:6. This Administrative Order is effective upon issuance.

B. PARTIES

1. The Department of Environmental Services ("DES"), Water Division, is a duly constituted administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, NH 03301.
2. David Emerson and Gail Ruocco are individuals having a mailing address of 85 North Rd., Kingston, New Hampshire 03848.

C. STATEMENTS OF FACTS AND LAW

1. Pursuant to RSA 482-A, DES regulates dredging, filling, and construction in or on any bank, flat, marsh, wetland, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. RSA 482-A:3, I states that "No person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES]."
3. Pursuant to RSA 485-A:17, DES regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, the Commissioner has adopted Env.Ws 415 to implement this program.
4. David Emerson and Gail Ruocco are the owners of real property located at 85 North Rd, Kingston, NH, more specifically referenced on Kingston Tax Map R32 as Lot 5 (the "Property").

5. On March 30, 2004, DES personnel conducted an inspection on the subject Property and observed the following:
 - a. Approximately 3 acres of minerotrophic bog (Cowardin Classification PSS/1Hgdx) had been dredged.
 - b. Open water was evident on the west side of the bog.
 - c. Dredge spoils that consisted of peat were evident on the east and west banks of the open water area.
 - d. Approximately 50' of a channel had been dredged from the bog to the stream
6. During the property inspection, David Emerson, the property owner, told DES personnel that he had excavated a pond following a 1967 Wildlife Pond Management Plan from Rockingham County Soil Conservation District. Mr. Emerson also indicated that he had been excavating the pond over the course of years because he could not afford to complete the project all at once. He also indicated that he wanted a fire pond in the area of the excavated bog.
7. During the property inspection, DES personnel advised David Emerson that:
 - a. Any work in wetlands requires a Permit from the Wetlands Bureau;
 - b. The impacted bog area was a high value wetland and that it was unlikely that the subject excavation in a bog for a wildlife pond would be approved through a permit process as there was no evidence of avoidance and minimization of impacts of the project;
 - c. That a fire pond, if located away from the bog area, might be possible through the permitting process if the pond met the permitting criteria.
8. During the property inspection, DES advised David Emerson to stop all work and retain a wetland scientist to develop a restoration plan for the impacted areas of the bog, the excavated stream channel and the emergent wetland area.
9. On April 9, 2004 DES personnel conducted another inspection of the property. During this inspection, DES delineated the edge of the open water area and intact bog wetland with a Global Positioning Unit (GPS). During this inspection a spotted turtle was observed and photographed within the intact vegetated area of the bog.
10. Also, during the April 9, 2004 inspection, DES observed that approximately 5,000 square feet of an emergent wetland had been filled directly adjacent to a stream, southeast of and downgradient from the bog.
11. Also, during the April 9, 2004 inspection, David Emerson agreed to retain a certified wetland scientist immediately to assess the wetland impacts and begin work on a restoration plan.
12. In April, 2005, David Emerson notified DES that he had retained Justin Ziemba, CWS of Promised Land Survey (the "Consultant") to assess the impacts on the Property.
13. On May 3, 2004, by letter, DES notified David Emerson of the findings from the March 30, and April 9, 2004 inspections. The letter proposed a restoration plan be developed and that a time schedule for completing the restoration be submitted to DES by May 20, 2004. The letter also outlined the following requirements that should be included in a restoration plan:

a. A plan with dimensions, drawn to scale, indicating the footprint of the wetland prior to disturbance (delineated in accordance with Section F of the Corps of Engineers Wetlands Delineation Manual), the footprint of the existing conditions indicating the areas that have been dredged and filled;

b. A plan for re-establishing the wetland to its original footprint;

c. A proposed means of erosion control;

d. A proposed schedule and construction sequence listing equipment and methods for accomplishing restoration;

e. A proposed planting plan for the re-establishment of wetland vegetation;

f. A proposed plan for re-establishing hydrology;

g. A proposed plan to minimize disturbance to wildlife;

h. A monitoring and reporting schedule, including an initial report to DES and at least four restoration progress assessment reports;

14. The May 3, 2004 letter also requested that no further work be done in jurisdiction until the Property is brought into compliance.

15. On May 24, 2004, DES personnel met with the Consultant and Christopher Danforth, CWS to discuss the impacts on the Property. It was agreed that the project would be divided into two phases. Phase I would address the impacts to the downstream emergent wetland area.

Implementation of the Phase I restoration plan would take place after DES approval and by September 15, 2004. Phase II would address the excavated bog and be implemented after DES approved a restoration plan by the fall of 2005.

16. On July 12, 2004 DES received from the Consultant a Restoration Plan (the "Restoration Plan-Phase I") for the restoration of 9,185 square feet of emergent wetland located southeast of the bog.

17. On July 16, 2004, DES approved the Restoration Plan-Phase I (the "Restoration Approval-Phase I").

18. On August 25, 2004, DES received amended plans for Phase I.

19. On September 3, 2004, DES issued an Amended Restoration Plan Approval.

20. Condition #12 of the Restoration Plan Approval-Phase I states that siltation, erosion and turbidity controls shall be in place prior to construction, shall be maintained during construction, and shall remain until the area is stabilized.

21. On October 25, 2004, the Consultant submitted by e-mail, the initial monitoring report with photographs. Contrary to Condition #12 of the Restoration Plan Approval-Phase I, the photographs submitted do not show that erosion controls were in place at the time of the restoration.

22. The initial monitoring report from the Consultant notes in paragraph six that "silt fence was not present on the site."

23. Condition #4 of the Restoration Approval Phase I states that a qualified wetlands consultant shall supervise the restoration activities on the Property to ensure that the restoration is accomplished pursuant to this Restoration Plan Approval.

24. The initial monitoring report from the Consultant notes that "he was not on site during construction and had not been hired for any structured monitoring."

25. Item #3 under Planting Notes on the approved Plan call for hay mulch to be applied over seeded areas at a rate of two tons per acre.

26. The photographs submitted in the initial monitoring report from the Consultant do not show any hay mulch in the restoration area.

27. On February 9, 2005, by letter, DES notified David Emerson that the time frame for submitting the Restoration Plan for Phase II would be extended to May 1, 2005. The Consultant was copied on the letter.

28. On February 14, 2005, the Consultant notified DES that he was not currently working on the Emerson Property.

29. On March 3, 2005, DES notified David Emerson that DES had been informed by the Consultant that he was not working on the project and requested that David Emerson provide information documenting that a new qualified wetland scientist had been retained to finish the restoration. Also, DES requested bi-monthly progress reports be submitted to document progress on the project.

30. On April 29, 2005 David Emerson contacted DES by telephone and requested a 15 day extension. DES allowed David Emerson an additional 15 days to retain a certified wetland scientist ("CWS").

31. On May 9, 2005, David Emerson contacted DES by telephone and indicated that his wetland consultant did not have the capacity to do the job. David Emerson also stated that he had contacted a wetland scientist, Peter Schauer, CWS, to assess the site.

32. On June 15, 2005 DES personnel inspected the property. DES observed that the implementation of Phase I of the restoration plan was not according to the approved Plan. Shrub plantings, soil conditions, and the extent of fill removal were not according to the Plan or Restoration Plan Approval. No topsoil or mulch was observed. Herbaceous vegetation in the area of the removed fill was sparse. No changes were observed in the dredged area of the bog.

33. After the inspection, David Emerson indicated that Peter Schauer, CWS, had visited the property but would not be retained to develop the restoration plan.

34. To date DES has not received any documentation that a certified wetland scientist has been retained to complete the restoration.

D. DETERMINATION OF VIOLATIONS

1. David Emerson and Gail Ruocco have violated RSA 482-A:3, I by excavating approximately 3 acres of a minerotrophic bog wetland.
2. David Emerson and Gail Ruocco have violated RSA 482-A:3 by excavating approximately 50 feet of stream channel.
3. David Emerson and Gail Ruocco have violated RSA 482-A:3, I by filling approximately 9,185 square feet of, an emergent scrub shrub wetland.
4. David Emerson and Gail Ruocco have violated RSA 485-A:17 by altering more than 100,000 square feet of terrain without a permit from the Department.

E. ORDER

Based on the above findings, DES hereby orders the Owners as follows:

1. **Immediately**, cease all work and activities in wetland, with the exception of the following:
 - a. installation, maintenance, and repair of turbidity, sediment and erosion controls; and
 - b. work under the supervision of a certified wetland scientist on Phase I Restoration
2. **Immediately**, and no later than within 30 days of the date of this order, stabilize all areas subject to erosion into jurisdiction including but not limited to the stockpile of dredged wetland soils on the south side of the open water area.
3. **Immediately** retain the services of a certified wetland scientist to prepare a restoration plan for the Phase II Restoration (the bog), and to assess and oversee Phase I Restoration and recommend remedial measures as necessary.
4. The restoration plan for the bog should be drawn to scale with dimensions and contain the following items:
 - a. A plan, using Section F. Atypical Situations of the 1987 *Corps of Engineers Wetlands Delineation Manual*, showing the original footprint and vegetative cover of the bog wetland areas. Data sheets shall be included.
 - b. A plan for re-establishing the wetland to its original footprint;
 - c. A proposed means of erosion, sediment, and turbidity control;
 - d. A plan for dewatering if necessary;
 - e. A proposed schedule and construction sequence listing equipment and methods for accomplishing restoration;
 - f. A proposed planting plan for the re-establishment of wetland vegetation;
 - g. A proposed plan for re-establishing hydrology;
 - h. A proposed plan to minimize disturbance to wildlife;
 - i. A plan or methodology to measure the success of the restoration;
 - j. A monitoring and reporting schedule, including an initial report to DES and at least five additional restoration progress assessment reports documenting conditions at the restoration area;

5. **Within 30 days** of the date of this order, submit the restoration plan to DES for approval.
6. **Within 60 days** of the date of this order fully implement the plan under the supervision of a certified wetland scientist and as conditioned in a separate DES Restoration Approval Letter.
7. Send correspondence, data, reports, and other submissions made in connection with this Administrative Order, **other than appeals**, to DES as follows:

Arlene Allen, Compliance Specialist
DES Water Division
PO Box 95
Concord, NH 03302-0095
Fax: (603) 271-6588
e-mail: aallen@des.state.nh.us

F. APPEAL

Any person aggrieved by this D.1-D.3 of this Order may request DES to reconsider the Order within 20 days of the date of the Order. The request for reconsideration must comply with Wt 203.01(d) (copy attached), and will be processed in accordance with Wt 203.01(e)-(j). Any party not be satisfied with the decision on reconsideration may appeal to the Wetlands Council. Please note that under RSA 482-A:10, II, the Council may not consider any ground that is not set forth in the request for reconsideration.

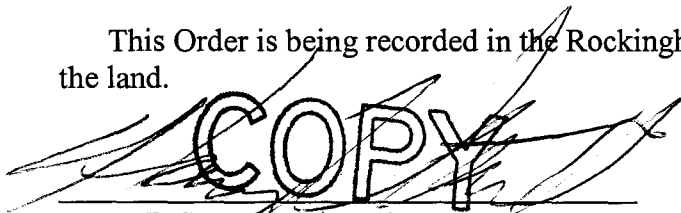
Any person aggrieved by determination D. 4 of this Order may appeal the Order to the New Hampshire Water Council by filing an appeal that meets the requirements specified in Env-WC 200 within 30 days of the date of this Order. Copies of the rule are available from the DES Public Information Center at (603) 271-2975 or at <http://www.des.state.nh.us/desadmin.htm>.

Appealing the Order or requesting reconsideration does not automatically relieve David Emerson and Gail Ruocco of the obligation to comply with the Order.

G. OTHER PROVISIONS

Please note that RSA 482-A and RSA 485-A provide for administrative fines, civil penalties and criminal penalties for the violations noted in this Order, in particular ongoing erosion and stabilization requirements as well as for failing to comply with the Order itself. The owners remain obligated to comply with all applicable requirements.

This Order is being recorded in the Rockingham County Registry of Deeds so as to run with the land.


Harry T. Stewart, P.E., Director
Water Division


Michael P. Nolin, Commissioner
Department of Environmental Services

Certified Mail/RRR: 7004 0750 0003 0561 7975

ec: Gretchen Hamel, DES Legal Unit —
Public Information Officer, DES PIP Office
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
cc: Kingston Conservation Commission
Kingston Board of Selectmen
Rockingham County Registry of Deeds